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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SIDNEY WAYNE BISHOP,

Defendant and Appellant.

A124510

(Contra Costa County  
Super. Ct. No. 050803874)

Defendant and appellant Sidney Wayne Bishop appeals his multiple drug convictions rendered after a jury trial on the grounds that the trial court erred by denying his pretrial suppression motion. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

On April 21, 2007, Concord police officers executed a search warrant at defendant's residence. When officers arrived to execute the warrant, they found the garage door slightly ajar and heard defendant playing guitar inside. The police officers identified themselves and defendant did not respond. The officers entered the garage, detained defendant and executed the search warrant. In the garage, officers found a marijuana-cultivating operation, 83 suspected marijuana plants, and more than 1.7 ounces of marijuana and digital scales. In addition, officers found 322 mason jars containing more than 2.1 pounds of psilocyn mushrooms and psilocyn mushrooms in early cultivation stages.<sup>1</sup>

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<sup>1</sup> These facts are taken from the probation report filed September 29, 2009.

Based on the above events, the District Attorney for the County of Contra Costa (DA) charged defendant with multiple drug offenses as set forth in the First Amended Information dated July 11, 2008. Specifically, the DA charged defendant as follows: Count one — felony cultivation of spores or mycelium (Health and Safety Code<sup>2</sup> § 11390); count two — felony possession of psilocyn or “Magic Mushrooms” (§ 11378); count three — felony cultivation of marijuana (§ 11358); count four — felony possession of marijuana for sale (§ 11359); count five — felony possession of Oxycodone (§ 11350, subd. (a))<sup>3</sup>; and count six — felony possession of concentrated cannabis (§ 11357, subd. (a).)

On October 16, 2007, defendant filed a motion to quash the search warrant, to traverse the search warrant, and to suppress evidence pursuant to Penal Code section 1538.5. A hearing on defendant’s motion was held on October 30, 2007. After hearing testimony and entertaining oral argument, the trial court denied defendant’s motion on all grounds.

A trial by jury commenced on January 15, 2009. On January 26, 2009, the jury returned guilty verdicts on counts one, two, three and six. On count four, the jury returned a guilty verdict on the lesser-included offense of misdemeanor possession of marijuana. At a sentencing hearing held on February 24, 2009, the trial court granted defense counsel’s motion to reduce the felony conviction on count six to a misdemeanor pursuant to Penal Code section 17, subdivision (b). Thereafter, the trial court sentenced defendant to the lower term of 16-months on count two, concurrent 16-month terms on counts one and three, and six-month concurrent terms on counts four and six. Appellant filed a timely notice of appeal on March 3, 2009.

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<sup>2</sup> Further statutory references are to the Health and Safety Code unless otherwise noted.

<sup>3</sup> Upon the People’s motion, count five was dismissed before trial.

## **DISCUSSION**

### **A. *Background***

The magistrate judge issued the search warrant for defendant's residence on April 21, 2007, upon application of Detective Nicholas Gartner of the Concord Police Department. The warrant describes the premises to be searched as a second story residence in a duplex building with a single-car style garage located underneath. Detective Gartner provided an affidavit in support of his application for the search warrant. In his affidavit, Gartner states that he recently spoke with a Confidential Informant (CI). Gartner provided the following information about the CI in the affidavit: "CI is an untested informant who contacted the Concord Police Department in order to provide information on drug dealers operating in Concord, California. I do not have a pending case against CI and CI is not seeking any financial gain for his/her assistance. I have no knowledge of CI lying to law enforcement in the past and CI's primary motivation for assisting law enforcement in his/her disapproval of drug dealers."

Detective Gartner further states in his affidavit that the CI told him that defendant grows and sells marijuana and "magic" mushrooms at his residence, that CI witnessed defendant selling these drugs from his garage beneath the residence, that defendant admitted to being a marijuana dealer, and that CI has no knowledge of defendant suffering any illness that would allow him to legally grow marijuana for medical use. Gartner also stated that the CI provided him with a description of defendant and his vehicle and told him that defendant had served a prison sentence.

Gartner stated that on April 17, 2007, he conducted surveillance at defendant's residence and observed a white male matching the description provided by the CI who "appeared to move around without any physical limitations." Gartner also observed a "white over blue" Ford Maverick matching the description provided by the CI. On April 18, 2007, Gartner reviewed defendant's criminal history. Gartner discovered that, as indicated by the CI, defendant had previously served a prison term. Gartner learned that defendant received a ten-year prison sentence in Iowa after pleading guilty to distribution of LSD. Gartner stated that Concord Police Narcotics Officers conducted

further surveillance at defendant's residence on April 18, 2007. Officers followed defendant and an unidentified white male to Navlets Garden Store in Pleasant Hill. At the garden store, police observed defendant examining bottles of liquid anti-fungus treatments and fertilizer products, and witnessed defendant select 3.5 cubic feet of Therm-o-Rock Vermiculite. The officers continued their surveillance and observed defendant exit the store with a large brown bag that matched the size and color of the bag of Vermiculite and load the bag into the trunk of his car. Gartner stated that Vermiculite is a substance commonly used by hydroponic marijuana growers.

In his affidavit, Gartner further stated: "On the morning of 04/19/07, I walked along the side of the garage of [defendant's residence] via the driveway. As I walked along the garage, I smelled the distinct odor of marijuana lingering within a 10-foot radius of the garage window. The window was closed and the distinct marijuana odor was only noticeable within the 10-foot radius of the garage window. The distinct marijuana odor was stronger the closer I was to the window, and weaker the farther I was from the window." Gartner added that based upon his training and experience, he knows that the cultivation of marijuana goes through three separate stages, and that at the flowering stage the plant produces a pungent odor which is easily detected. Gartner stated that in his 8.5 years as a police officer he had smelled the distinct odor of marijuana and confirmed its marijuana source more than 50 times.

At the suppression hearing on October 30, 2007, the trial court denied defendant's motion to traverse the search warrant pursuant to *Franks v. Delaware*.<sup>4</sup> The trial court also denied defendant's motion to quash the search warrant, reasoning that the affidavit, which included Detective Gartner's statement about the odor of marijuana emanating from defendant's garage, contained sufficient probable cause for the magistrate to issue

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<sup>4</sup> In *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*), the high court held "that a defendant may challenge the veracity of the search warrant's affidavit due to police misconduct, but only upon a substantial preliminary showing that the affiant lied and that the remaining contentions in the affidavit are insufficient to establish probable cause." (*People v. Navarro* (2006) 138 Cal.App.4th 146, 165.) Defendant does not appeal the trial court's *Franks* ruling.

the warrant.<sup>5</sup> The trial court then announced it would take evidence on the question of whether the evidence should be suppressed because Detective Gartner smelled the odor of marijuana from an illegal vantage point.

On this point, Detective Gartner testified he went to defendant's residence (street number 2141) two days before the issuance of the search warrant. Gartner described defendant's residence as a two story building with the residence on top and a garage underneath at street or ground floor level. The prosecutor showed Gartner a series of six photographs, marked as People's Exhibits 1-6, which Gartner stated accurately depicted the buildings and structures as he saw them on the day he went there. Gartner testified that he smelled "a distinct pungent odor of marijuana coming from a window . . . located within the garage on the side of the property." Gartner testified that Exhibit 5 depicts the window he walked by when he detected the strong odor of marijuana. Exhibit 5 shows the window covered by an iron grill and boarded up from the inside with plywood. With the aid of the photographs, Gartner explained that the window faces onto a driveway. The driveway leads to a parking area for a separate residential building (street number 2145) that is situated behind defendant's residence. Gartner testified that the driveway runs for about 25 yards from the street to the residence at No. 2145. Gartner stated that when he walked down the driveway, he could smell marijuana when he was about 10 feet away from the window, the smell was strongest right at the window, and then grew weaker as he walked past the window towards the rear of the building.

At the conclusion of the hearing, the trial court stated: "Well, I think a picture is worth a thousand words, that there are two houses. They are --- one must go down that driveway to trick or treat at the house in the back or deliver a package or knock on the

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<sup>5</sup> *People v. Costello* (1988) 204 Cal.App.3d 431, 451 [noting that the facts supporting the magistrate's probable cause determination must appear " 'within the four corners of the warrant affidavit' "; see also *Whiteley v. Warden* (1971) 401 U.S. 560, 565, fn. 8 ["insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate"].)

door and solicit money for charity or just come and visit. And so I find that this was not an illegal vantage point, and the motion to suppress is denied.”

### **B. Analysis**

The crux of defendant’s argument on appeal is that the key evidence corroborating the information provided to police by the CI, namely, the strong odor of marijuana emanating from defendant’s garage window, is tainted and should be excised from the affidavit because Detective Gartner was not legally entitled to be in the driveway. We disagree.<sup>6</sup>

The Fourth Amendment protects from unreasonable search and seizure only those areas in which a person has a reasonable expectation of privacy. (*United States v. Knights* (2001) 534 U.S. 112, 118-119.) Thus, to claim protection of the Fourth Amendment, not only must defendant manifest a subjective expectation of privacy in the particular place, but defendant’s expectation of privacy must also be one that society is prepared to recognize as reasonable. (*People v. Camacho* (2000) 23 Cal.4th 824, 830-831.) This Fourth Amendment enquiry is not controlled by the law of trespass: “Rather, the relevant inquiry is whether entry is made into an area impliedly open to the public. ‘A sidewalk, pathway, common entrance or similar passageway offers an implied permission

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<sup>6</sup> Assuming Detective Gartner smelled the odor of marijuana from a legal vantage point, we have no difficulty in concluding the contents of the affidavit provided adequate probable cause for the magistrate to issue the warrant. (See *People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1716 [“A reviewing court will consider the totality of the circumstances to determine whether the information contained in an affidavit supporting the application for a warrant establishes a fair probability that a place contains contraband or evidence of a crime. (Citation.) Doubtful or marginal cases are to be resolved by the preference to be accorded to warrants. (Citation.)”].) Under the same assumption, we also have no difficulty in concluding that Detective Gartner’s olfactory perceptions satisfied the standard for corroboration of information provided to him by the CI. (See *People v. Gotfried* (2003) 107 Cal.App.4th 254, 263-264 [“ ‘Because unverified information from an untested . . . informant is ordinarily unreliable, it does not establish probable cause unless it is “corroborated in essential respects by other facts, sources or circumstances.” [Citations.] For corroboration to be adequate, it must pertain to the alleged criminal activity; accuracy of information regarding the suspect generally is insufficient. [Citation.]’ ”].)

to the public to enter which necessarily negates any reasonable expectancy of privacy in regard to observations made there. The officer who walks upon such property so used by the public does not wear a blindfold; the property owner must reasonably expect him to observe all that is visible [or smell all that is odorous]. In substance the owner has invited the public and the officer to look and to see.’ (Citation.)” (*People v. Chavez* (2008) 161 Cal.App.4th 1493, 1500.)

In this case, Detective Gartner smelled the odor of marijuana emanating from a window of defendant’s garage from his position on the driveway that runs from the street sidewalk, down the side of defendant’s residence (No. 2141) to the parking area for a separate residence (No. 2145). We have examined the photographs admitted into evidence at the suppression hearing, and agree with the trial court’s determination that the driveway is a public passageway to No. 2145. As such, defendant had no reasonable expectation of privacy in the vantage point from which Detective Gartner sniffed out evidence of marijuana in his garage. Accordingly, the trial court did not err by denying defendant’s motion to suppress that evidence.

#### **DISPOSITION**

The sentence and judgment of conviction are affirmed.

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Jenkins, J.

We concur:

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McGuinness, P. J.

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Siggins, J.